In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 76-388

BERNARD E. NIEDERMEYER and
TESSIE S. NIEDERMEYER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

AUTHORITIES CITED

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this cause on April 30, 1976.

OPINION BELOW

The opinion of the court of appeals, reported in 535 F.2d 500, appears in Appendix A hereto. (A-1). The opinion of the Tax Court reported in 62 T.C. 280 (1974) appears in Appendix C hereto. (A-5).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1976. A timely petition for rehearing and suggestion of appropriateness of rehearing *en banc* was denied on June 23, 1976. Appendix B (A-3). This petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Should the rule in *United States* v. *Davis*, 397 U.S. 301 (1970) be reconsidered?

2. If not to be reconsidered, is the *Davis* case an absolute mandate that the attribution rules create a conclusive presumption, must be mechanically applied in all cases and thus require that all mitigating factors (such as family discord) be disregarded?

3. Should the rule in the *Davis* case be mechanically applied to a case where the purchase was made of stock in one corporation by another corporation in which the petitioners owned no stock and the stock in the two corporations were owned by hostile family groups?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are lengthy and their pertinent text is set forth in Appendix D. (A-30). Following are the citations of the statutes [all references are to the Internal Revenue Code of 1954 (26 U.S.C.)]:

(1) Section 302 (relating to distributions in redemption of stock) provides in subparagraph (a) that such a redemption shall be treated as a distribution in payment and exchange for stock if under subsection (b)(1) the redemption is not essentially equivalent to a dividend or under subsection (b)(3) there is a termination of the shareholder's interest. Subsection (c)(1) incorporates the provisions for constructive ownership of stock. Subsection (c)(2) provides a special rule for determining if there is a termination of interest where there is constructive ownership by providing that if the distributee has no interest in the corporation after the distribution, acquires no interest within ten years, and files an agreement to notify as to any such acquisition and retain records, the attribution section will not apply in determining termination of interest.

(2) Section 304 relates to redemptions through the use of related corporations. Subsection (a)(1) provides that where one or more persons are in control of two corporations, and one of the corporations acquires stock in the other from the persons in control, the transaction will be treated as a redemption of the stock of the acquiring corporation.

(3) Section 318 relating to the constructive ownership of stock provides that an individual shall be considered as owning the stock owned by his children.

STATEMENT OF THE CASE

The following statement of the case is taken from the opinion of the Tax Court which was not disturbed by the court of appeals: The petitioners Bernard E. Niedermeyer (Bernard Sr.) and Tessie E. Niedermeyer are husband and wife. Prior to October 1, 1963, the male members of the Niedermeyer family were active in the business of manufacturing and selling special wood products and related construction materials through a partnership and a number of corporations. One such business was the Niedermeyer-Martin Co., a general partnership, whose partners were petitioner Bernard Sr. and his sons Bernard E. Niedermeyer, Jr. (Bernard Jr.), Edward C. Niedermeyer (Edward C.), Linus J. Niedermeyer (Linus J.) and Thomas J. Niedermeyer (Thomas J.). The corporations engaged in the business of manufacturing the special wood products and related construction materials were American Timber & Trading Co., McCoy Pole and Lumber Co., Columbia Woodworking Company and American Wood Preserving Co., all of which were Oregon corporations. These Oregon corporations owned the wood fabrication and treating facilities which were necessary for the principal activity of the partnership which was engaged in the selling of the special wood products and related construction supplies and materials. Edward C., Linus J. and Thomas J. did not own any shares in the four Oregon corporations.

During 1963, disputes arose between Bernard Jr. and his three brothers Edward C., Linus J. and Thomas J. who engaged separate counsel and were threatening to bring an accounting suit against Bernard Jr., who owned a substantial portion of the stock in the four wood fabrication and treating corporations.

Lents Industries, Inc. (Lents) was incorporated on or about May 29, 1963, at the direction of Edward C., Linus J. and Thomas J. who owned approximately two-thirds of its shares. Lents was originally formed by Edward C., Linus J. and Thomas J. during the time that they were having the controversy with their brother Bernard Jr. Subsequently, Lents was operated to handle sales of lumber and other materials including sales to Arab countries not available to the Niedermeyer-Martin Co.

Shortly prior to October 1, 1963, an agreement was reached between the foregoing four Niedermeyer brothers and the petitioner, Bernard Sr. Bernard Jr. retired from the Niedermeyer-Martin Co. partnership, his partnership interest was purchased by his three partner-brothers, Edward C., Linus J. and Thomas J. Also, on October 1, 1963, Niedermeyer-Martin Co. was formed as an Oregon corporation by the four remaining partners of Niedermeyer-Martin Co., i.e., Edward C., Linus J., Thomas J. and the petitioner Bernard Sr. Upon formation of Niedermeyer-Martin Co. it did not own any fabrication and treating facilities and the fabrication and treating facilities which were owned by American Timber & Trading Co.

(AT&T), McCoy Pole and Lumber Co., Columbia Woodworking Company and American Wood Preserving Company all became the property of American Timber & Trading Co. which was the surviving corporation by merger on October 10, 1963 of the foregoing four Oregon corporations. The petitioners owned approximately 22% of the common shares of AT&T. Bernard Jr. owned over 63% of the common shares of AT&T. Edward C., Linus J. and Thomas J. did not own any shares in AT&T. Subsequent to October 1, 1968, Bernard Jr. as controlling stockholder in AT&T refused, except for one occasion, to allow AT&T to do any business with Niedermeyer-Martin Co. and AT&T and was its chief competitor.

On September 8, 1966, the petitioners owned approximately 22% of the comomn stock of AT&T and they owned 125 shares of the outstanding 2,136 shares of $100 par value, 6 percent cumulative preferred stock of AT&T. On the foregoing date (September 8, 1966) petitioners sold their AT&T common stock to Lents for approximately $175,000. On December 28, 1966, the petitioners contributed their 125 shares of AT&T preferred stock to a tax exempt organization. At the time of the sale and all times subsequent thereto, the petitioners ceased to have any interest in AT&T either as an officer, director or employee save and except their ownership of the 125 shares of AT&T preferred stock for the period from September 8, 1966 to December 28, 1966.

Lents acquired the petitioners' AT&T common

stock because the three Niedermeyer brothers, Edward C., Linus J. and Thomas J. (who were the controlling shareholders in Lents and with whom Bernard Jr. had the disagreements) were pursuing a plan to gain control of AT&T.

The Tax Court held that the amounts received by the petitioners for their AT&T common stock should be treated as a dividend rather than as payment in exchange for their AT&T stock. The Tax Court held that section 318 makes petitioners the owners of the stock of their adult lumberman sons. Thus the petitioners owned a controlling interest in both Lents (in which they owned no shares) and in AT&T in which (by attribution) they owned the controlling 63 percent of common stock owned by Bernard Jr. Attribution applies under section 304. Therefore, since petitioners control both Lents and AT&T, the transaction is to be treated as a redemption of the stock of Lents (a company in which they own no stock except through attribution). Furthermore, the Tax Court held under section 302(b)(1) the transaction was essentially equivalent to a dividend. Furthermore, the Tax Court held that the termination of interest exception to the attribution rule did no apply because, while petitioners did file the necessary statement, the fact that they held the 125 shares of the outstanding 2,136 shares of $100 par value preferred stock from September 8, 1966 to December 28, 1966 prevented the exception from applying.

REASONS FOR GRANTING THE WRIT

1. This Court Should Reconsider the Rule in United States v. Davis.

The special and important reasons why a writ should be granted are set forth in the dissenting opinion of Mr. Justice Powell in *Albers* v. *Commissioner*, 414 U.S. 982 (1973), a case in which certiorari was denied. Mr. Justice Powell was joined in his dissent by Mr. Justice Douglas and Mr. Justice Blackman.

As Mr. Justice Powell states, the *Davis* rule is "often a trap for unwary investors in small businesses."

This case is another example of a "bizarre result" from mechanically applying the rule of the *Davis* case and reading Section 302(b)(1) out of the Code — something that Congress deliberately declined to do in 1954 when it was adopted.

Here the petitioners owned 22 percent of the common stock in AT&T and 125 shares of its 2136 shares of $100 par value preferred stock. They owned no shares in Lents. Two-thirds of the shares of Lents were owned by three of petitioners' adult lumberman sons. Another adult lumberman son owned 66 percent of the shares of AT&T. After threatened litigation between the three Lents owner-brothers on the one hand and the AT&T brother on the other, the petitioner Bernard Sr. and his three Lents owner-sons formed the Niedermeyer-Martin Co. The three Lents owner-sons formed Lents prior to the formation of

Niedermeyer-Martin Co. After such formation Lents did business in the Arab countries not available to Niedermeyer-Martin Co.

AT&T was the owner of the manufacturing facilities necessary for the business of the sales operations of the Niedermeyer-Martin Co. AT&T was Niedermeyer-Martin Co.'s chief competitor and AT&T refused, except on one occasion, to do business with Niedermeyer-Martin Co. On September 8, 1966, Lents purchased the 22 percent common stock interest of petitioners in AT&T. On December 28, 1966, the petitioners disposed of their 125 shares of $100 par value preferred stock in AT&T. Lents purchased the petitioners' 22 percent ownership in AT&T common stock as the first step in a plan to acquire control of AT&T.

The application of the *Davis* rule automatically and mechanically requires that the purchase of the AT&T shares by Lents be treated as a dividend and not a sale, even though the petitioners did not in fact control either Lents or AT&T. There was a good business reason for Lents acquiring the AT&T stock. There is not even a hint of any tax avoidance purpose. After disposing of their common shares on September 8, 1966, later in the same year (on December 28, 1966) petitioners disposed of their preferred shares and terminated even this insubstantial and tenuous interest. However, because the statute says the termination must be immediately after the sale of the common stock, and because of this comparatively momentary ownership and the rigors of the *Davis* rule, the

lower courts felt bound to disregard these facts and deny petitioners the benefit of their compliance with the exception contained in Section 302(c)(2) (termination of interest plus filing of the statement to notify if they acquired any interest within 10 years).

There are obviously thousands of small family-owned corporations similar to the ones owned by petitioners and their sons. It is not the large corporation that is affected by the trap into which petitioners fell (and into which other small family-corporations may fall). Therefore, this case affects, and may affect, countless other small family-businesses. This certainly is a special and important reason for the necessity of re-examining the rule of the *Davis* case for the reasons set forth by Mr. Justice Powell in his opinion in *Albers* v. *Commissioner*, supra.

2. The Rule in the Davis Case Should Not Be Extended.

If the rule in the *Davis* case is not re-examined, it certainly should not be extended. To so extend it would result in possible hardship to thousands of small family-owned businesses.

We submit that the situation present here has an almost direct analogy in this Court's handling of the family partnership cases decided shortly after World War II. Countless small family businesses were affected because of the attraction of avoiding the corporate excess profits tax and also the dividing of income between husband, wife and other family members. In the case of *Commissioner* v. *Tower*, 327 U.S. 280

(1946) and *Lusthaus* v. *Commissioner*, 327 U.S. 293 (1946), this Court made certain statements as to what was necessary to allow a husband and wife to be treated as partners. These statements were seized upon by the Internal Revenue Service and in turn adopted by the Tax Court which practically made it impossible to have a partnership recognized between husband and wife or other family members. The language there (just as the language in the *Davis* case) was construed to mean that you arbitrarily and mechanically had to deny the recognition of a family partnership except in extreme cases. This is the same approach that was taken by the Tax Court and adopted by the court of appeals in this case. In the family partnership cases, it was necesasry for this Court to grant a writ and hear the case of *Commissioner* v. *Culbertson*, 337 U.S. 733 (1949). In the *Culbertson* case this Court held that the Tax Court had misconstrued its two previous decisions and that all of the facts and circumstances should be taken into consideration, and that the previous two cases did not practically automatically disallow partnership treatment to such family partnerships. Mertens, Law of Federal Income Taxation, § 18.08a, p. 45, discusses the interplay of the foregoing three cases. We submit that this Court should hear this case for the same reason that it heard the *Culbertson* case, i.e., the Tax Court is in effect extending the rule of the *Davis* case by holding that the courts are absolutely precluded from looking at any of the facts and circumstances and therefore Section 302(b)(1) must be arbitrarily and

mechanically applied in the face of the facts that exist here and which were not present in the *Davis* case.

Since the petitioners did not own directly any shares in the acquiring corporation (Lents) and they only directly owned approximately 22 percent of the issuing corporation (AT&T) the only thing that brings Section 304 into play is their constructive ownership of the 63 percent of the AT&T shares owned by their son, Bernard Jr. Also, under Section 302(b)(1) this transaction would obviously not be substantially equivalent to a dividend but for the application of the attribution rules contained in Section 318 which make taxpayers constructively own the shares of Bernard Jr.

In the *Davis* case, this Court refers to Bittker & Eustice, Federal Income Taxation of Corporations and Shareholders (2nd Ed.) and on two occasions cites, relies on and labels the foregoing work as being by the leading commentators on the specific subject of Section 302(b)(1) [fn. 7, p. 306 and fn. 10, p. 311].

In their third edition, written after the *Davis* case, the authors suggest a situation in which pro rata redemption might fall within the provisions of Section 302(b)(1) as follows:

> "Another possibility is a redemption that is pro rata only because of the constructive ownership rules of Section 318, if the disqualifying stock is attributed from one member of a family to an independent or hostile adult; in this connection, it should be noted that Regs. Section 1.302-2(b) states that pro rata redemptions 'generally' —rather than always—are to be treated as distributions." (3rd Edition, Section 9.24, p. 9-24).

The genesis of the above suggestion is the acquiesced opinion in *Squier* v. *Commissioner*, 35 T.C. 950 (1961). The *Davis* case approved commentators apparently feel that this case has not been overruled by *Davis* and in the attribution area it does not follow that Section 302(b)(1) has to be automatically applied as was done by the Tax Court and approved by the court of appeals here. Section 318 was involved in the *Davis* case. There the redemption would have been disproportionate if the taxpayer-husband had not by attribution owned 100 percent of the shares of the company because of the ownership of shares by his wife and children. Therefore, what is said about the attribution rule and its application must be read in the light of the facts of the case.

It is easily demonstrable that if the *Davis* rule is to be applied to the petitioners, the rule is being substantially extended because of the difference in the facts in the case at bar.

Here the facts are different in the following respects:

(a) The petitioners owned no shares in the acquiring corporation, Lents. Their only connection is by attribution under Section 318 and then the application of Section 304.

(b) Section 318 is based upon a presumption

of family solidarity, the family should be treated as a unit, and families can generally be expected to pursue common objectives in the exercise of corporate control without strict regard for the formalities of title. However, that is not the case here. The petitioner Bernard Sr. was associated with Niedermeyer-Martin Co. with his three adult lumberman sons who controlled Lents. Lents was formed during a controversy between the foregoing three brothers and Bernard Jr. who controlled AT&T. Lents handled the sales to Arab countries not available to Niedermeyer-Martin Co. AT&T was Niedermeyer-Martin Co.'s chief competitor and owned all of the manufacturing facilities necessary for the sales activities of Niedermeyer-Martin Co.

(c) Petitioners sold their common stock in AT&T to Lents on September 8, 1966. They continued to own 125 out of the 2136 shares of $100 par value preferred stock of AT&T until December 28, 1966, on which date by disposing of these 125 shares the petitioners completely terminated all interest in AT&T. Petitioners filed a statement authorized by Section 302(c)(2)(A) which would make Section 318 not apply. Therefore, even if the decision of the Tax Court and court of appeals is not disturbed, the only thing that makes Section 318 apply is the fact that the petitioners owned the insignificant number of preferred shares for the period from September 8, 1966 to December 28, 1966.

Therefore, if the *Davis* rule is to apply here, then it is absolutely clear that Section 302(b)(1) is in effect eliminated from the code. To apply the rule here means that factors such as those set forth above which were not present in the *Davis* case must be disregarded and the treasury and the courts must blindly apply the attribution rule without any regard to the realities of the matter and the factual situation involved.

This Court should come to the rescue of small family-corporations and at least determine whether or not the rule of the *Davis* case is to be so extended.

3. The Decision of the Court of Appeals Is in Conflict with the Decision of Another Court of Appeals on the Same Matter.

In its decision, the Tax Court relied upon its decision in *Robin Haft Trust*, 61 T.C. 398 (1973) stating that in that case it had been decided, in the light of the *Davis* case, that the rationale of *Squier*, supra, was no longer applicable to Section 302(b)(1). This is diametrically opposed to the view of Bittker & Eustice, supra. Subsequent to the decision in the Tax Court, the United States Court of Appeals for the First Circuit reversed the Tax Court in *Robin Haft Trust* v. *Commissioner*, 510 F.2d 43 (C.A. 1, 1975). In its decision, the Court of Appeals relied heavily on the views of Bittker & Eustice mentioned above.

Here, the Tax Court after flatly stating that the *Squier* case had in effect been overruled by *Davis* added

a statement that in addition there was no dispute between the petitioners and their sons and that the falling out was between the petitioners' sons. The Tax Court then went back to its primary basis for its decision by stating: "the 'control' test of sections 304 (a)(1) and 304(c) requires that the attribution rules be applied in every case." (App. C, p. A-15).

The court of appeals referred the *Robin Haft Trust* case back to the Tax Court to determine whether there was family discord tending to negate the presumption that the taxpayers there would exert continuing control over the operation of the corporation despite the redemption. In the case at bar this is not necessary because the Tax Court adopted the stipulation and made additional findings of fact showing the existence of the family discord.

Furthermore, in the *Robin Haft Trust* case there was no indication of discord between the taxpayer and the trust for his children whose shares were attributed to him. The discord was between the taxpayer and his former wife.

The court of appeals here (App. A, p. A-1) did not even mention the *Robin Haft Trust* case in the other circuit or discuss the fact that there, too, there was no hostility between the father and the children's trust. It was merely content to say that the *Squier* case didn't apply because there was no hostility between the petitioners and their sons.

Not only is there a conflict between the decision here and the one in the First Circuit, but there is also

an important conflict between the decision of the First Circuit and the decision in the Tax Court which will create problems for small family-owned taxpayers who have cases in circuits other than the First Circuit. As is pointed out in Cathcart, Section 302 Redemptions: Family Fights and Attribution, 61 A.B.A.J. 1272 at page 1275, taxpayers, especially those outside the First Circuit, would be ill-advised to plan to claim exchange treatment under Section 302(b)(1) by applying the rule of the *Squier* and *Haft* cases. The same thing would be applicable to stockholders in small family corporations who have fallen into the trap into which the petitioners fell.

CONCLUSION

It is vitally important for the thousands of small family-owned corporations that this Court hear this case and determine either that the *Davis* case is wrong as was urged by Mr. Justice Powell or at least that it should not be extended as was done by the Tax Court and the court of appeals here.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARD E. NIEDERMEYER and
TESSIE S. NIEDERMEYER,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 74-3082

OPINION

[April 30, 1976]

On Appeal from the Decision of the
United States Tax Court

Before: SMITH,* HUFSTEDLER, Circuit Judges,
and WOLLENBERG,** District Judge.

PER CURIAM:

The taxpayers, husband and wife, owned 22.58 percent of the common stock and 125 shares of the preferred stock of American Timber & Trading Co., Inc. ("AT&T"), a closely held corporation. Two of the taxpayers' sons owned 67.91 percent of the common stock of AT&T. Three other sons of the taxpayers owned 67 percent of the common stock of Lents Industries, Inc. ("Lents"), another closely held corpora-

* Honorable J. Joseph Smith, Senior Circuit Judge, Second Circuit, sitting by designation.

** Honorable Albert C. Wollenberg, Senior District Judge, Northern District of California, sitting by designation.

tion. The taxpayers owned no shares in Lents. The taxpayers sold all of their AT&T common stock to Lents on September 8, 1966. On December 28, 1966, the taxpayers contributed all of their AT&T preferred stock to a tax exempt foundation.

Sustaining the Commissioner's assessment against the taxpayers of a $73,280.08 deficiency in federal income taxes for the calendar year 1966, the Tax Court held that (1) the taxpayers' sale of their AT&T common stock to Lents was a redemption through the use of a related corporation under section 304(a)(1) of the Internal Revenue Code of 1954 ("Code"), (2) the redemption did not qualify for treatment as an exchange under either section 302 (b)(1) or section 302 (b)(3) of the Code, and (3) the proceeds were therefore to be treated as a distribution of property to which section 301 of the Code applied. *Niedermeyer* v. *Commissioner*, 62 T.C. 280 (1974).

We do not reach the question whether the "bad blood" exception to the attribution rules of section 318 (a), stated in *Estate of Arthur H. Squier*, 35 T.C. 950 (1961), is valid. We agree with the Tax Court that the record does not support any finding that there was any bad blood between the taxpayers and their sons. The only evidence related to a quarrel among the brothers.

We adopt the reasoning of the Tax Court as our own.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARD E. NIEDERMEYER and
TESSIE S. NIEDERMEYER,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 74-3082

ORDER

On Appeal from the Decision of the
United States Tax Court

Before: SMITH,* HUFSTEDLER, Circuit Judges, and WOLLENBERG,** District Judge.

The judges originally concerned with the case have unanimously voted to deny the Petition for Rehearing. Judges Smith and Hufstedler have voted to reject the suggestion for en banc rehearing, and Judge Wollenberg has recommended that such suggestion be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has

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* Honorable J. Joseph Smith, Senior Circuit Judge, Second Circuit, sitting by designation.

** Honorable Albert C. Wollenberg, Senior District Judge, Northern District of California, sitting by designation.

requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Filed June 23, 1976.

APPENDIX C

62 T.C. No. 34

UNITED STATES TAX COURT

BERNARD E. NIEDERMEYER and
TESSIE S. NIEDERMEYER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 1673-71 Filed June 6, 1974.

Petitioners, husband and wife, owned 22.58 percent of the common stock of AT&T and 125 shares of its preferred stock. Two of petitioners' sons owned 67.91 percent of the common stock of AT&T. Petitioners owned no stock of Lents but three of their other sons owned 67 percent of its common stock. On September 8, 1966, petitioners sold their AT&T common stock to Lents, and on December 28, 1966, petitioners contributed their AT&T preferred stock to The Niedermeyer Foundation. *Held:* (1) The sale of the AT&T common stock constituted a redemption through the use of a related corporation under sec. 304(a)(1); (2) such redemption does not qualify for treatment as an exchange under either sec. 302(b)(1) or sec. 302(b)(3), thus the proceeds are to be treated as distributions of property to which sec. 301 applies.

Denton G. Burdick, Jr., for the petitioners.
Lee A. Kamp, for the respondent.

STERRETT, *Judge:* The respondent determined

a deficiency of $73,280.08 in the federal income taxes of the petitioners for the calendar year 1966. The ultimate issue presented requires our determination of (1) whether the sale by petitioners of all their common stock in American Timber & Trading Co., Inc. to Lents Industries, Inc. was a redemption through the use of a related corporation under section 304(a)(1),[1] I.R.C. 1954 and, if so, (2) whether the redemption should be treated as a distribution in full payment in exchange for the redeemed stock under section 302 (a) or as a distribution of property to which section 301 applies.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts, together with the exhibits attached thereto, are incorporated herein by this reference.

Petitioners Bernard E. Niedermeyer and Tessie S. Niedermeyer are husband and wife who, at the time of the filing of the petition herein, maintained their legal residence in Portland, Oregon. They filed their joint federal income tax return for the calendar year 1966 with the district director of internal revenue at Portland, Oregon.

American Timber & Trading Co., Inc. (hereinafter AT&T) was organized under the laws of the State of Oregon and its principal place of business is

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

in that state. Prior to September 8, 1966, the issued and outstanding common stock of AT&T was owned as follows:

Stockholder	Relationship to Petitioners	Shares	Percentage of Shares
Bernard E. Niedermeyer	Petitioner	712.928	14.88
Tessie S. Niedermeyer	Petitioner	370.189	7.70
Bernard E. Niedermeyer, Jr.	Son	3,055.221	63.58
Elma M. Niedermeyer	Daughter-in-law	116.400	2.42
Walter E. Niedermeyer	Son	207.851	4.33
S. T. Nava	Son-in-law	50.838	1.06
M. T. Moothart	None	16.243	.38
Others	None	273.413	5.65
			100.00%

On September 8, 1966, Bernard E. Niedermeyer and Tessie S. Niedermeyer owned 70½ and 54½ shares, respectively, of the $100 par value, 6 percent cumulative preferred stock of AT&T. The total number of issued and outstanding preferred shares at that time was 2,136.

The AT&T preferred stock and the rights of the stockholders owning that stock are described in AT&T's Articles of Amendment to the Articles of Incorporation as follows:

> 2. PREFERRED: The corporation shall have authority to issue 3,000 shares of preferred stock, to be designated as such, which stock shall have a par value of $100 per share. The holders of issued and outstanding shares of preferred stock shall receive dividends on the par value of such stock at the rate of six percent of said par value per annum, which shall be set aside and paid before any dividends shall be set aside or paid upon the shares of common stock of this corporation. If

said preferred dividend of six percent is not paid in any one year, it shall accumulate and become a charge upon the unreserved earned surplus of the corporation of the next and succeeding years, and all such accumulated and unpaid dividends on the preferred stock must be paid in full (but without interest) before the common stock of this corporation shall be entitled to receive dividends. Preferred stock shall receive no dividend other than said preferred dividend of six percent, and shall not otherwise participate in the surplus or earnings of the corporation. Shares of preferred stock shall not be entitled to any vote at meetings of the shareholders of this corporation. The corporation may at any time, or from time to time, redeem the whole or any part of its preferred stock as permitted by law by paying therefor the par value thereof and all accrued unpaid dividends thereon at the date fixed for such redemption.

In the event of the liquidation or dissolution of this corporation the holders of outstanding shares of preferred stock shall receive from the money and/or property available for distribution to shareholders, the full par value of their shares, plus all accumulated and unpaid preferred dividends thereon (but without interest), before distribution is made to the holders of common stock.

The preferred stock was authorized and issued during a reorganization of several companies and an amount equal to the par value of the preferred stock was transferred from earned surplus to AT&T's capital account.

Lents Industries, Inc. (hereinafter Lents) is a cor-

poration organized under the laws of the State of Oregon and doing business in that state. During 1966, the issued and outstanding common stock of Lents was owned as follows:

Stockholder	Relationship to Petitioners	Shares	Percentage of Shares
E. C. Niedermeyer	Son	16	22-1/3
L. J. Niedermeyer	Son	16	22-1/3
T. J. Niedermeyer	Son	16	22-1/3
M. T. Moothart	None	8	11
S. T. Nava	Son-in-law	8	11
W. G. Cooney	None	8	11

On September 8, 1966, petitioners sold their AT&T common stock to Lents for $174,975.12 but retained their 125 shares of AT&T preferred stock. Petitioners' basis for their AT&T common stock was $6,653.54. Lents' earnings and profits for the year in question were sufficient to cover the purchase of petitioners' AT&T common stock and, as stipulated, are reflected in the following tabulation:

Ending balance May 31, 1966	$ 163,950.74
Net profit for fiscal year ended May 31, 1967	223,040.41
Federal income tax	(94,104.89)
State income tax	(13,357.44)
Stock dividend	(216,000.00)
Ending balance May 31, 1967	$ 63,528.82

On December 28, 1966, petitioners contributed their 125 shares of AT&T preferred stock to The Niedermeyer Foundation, a tax exempt organization, and claimed a charitable contribution deduction in the amount of $12,500 on their 1966 joint federal income tax return. Petitioners had previously

contributed their other AT&T (or its predecessor's) preferred stock as follows:

Shares	Year	Donee
273	1956	The Niedermeyer Foundation
156	1958	" " "
32	1959	" " "
26	1961	" " "
39	1962	" " "
100	1963	Mt. Angel Abbey

At the time of the sale of their AT&T common stock on September 8, 1966 and since such sale neither of the petitioners was, or has been, either an officer, director or employee of AT&T. At the time of said sale, and at all times subsequent thereto, petitioners ceased to have any interest in AT&T, save and except their ownership of the 125 shares of AT&T preferred stock which petitioners contributed to The Niedermeyer Foundation on December 28, 1966.

On September 24, 1968, petitioners filed an amended federal income tax return for the calendar year 1966 with the district director of internal revenue for the district of Oregon. Attached to this return was a statement entitled "Statement Pursuant to Regulation 1.302-4" by which petitioners filed the agreement called for in section 302(c)(2)(A)(iii). Said return and statement were filed after the necessity of such an agreement for qualification of the transaction as a complete termination of petitioners' interest in AT&T was brought to the attention of the preparer of petitioners' 1966 return during an audit of that return.

The Niedermeyer family was active in the business of manufacturing and selling special wood products

and related construction materials. Besides the aforementioned corporations, members of the Niedermeyer family were partners or shareholders in other organizations carrying on this business. One such business, prior to October 1, 1963, was the Niedermeyer-Martin Co., a partnership whose general partners were the petitioner, Bernard E. Niedermeyer (29 percent interest) and his sons, Bernard E. Niedermeyer, Jr. (27 percent interest), Edward C. Niedermeyer (16 percent interest), Linus J. Niedermeyer (16 percent interest), and Thomas J. Niedermeyer (12 percent interest).

During 1963 disputes arose between Bernard E. Niedermeyer, Jr. and the latter three Niedermeyer brothers. The result of these disagreements was that Bernard E. Niedermeyer, Jr. retired from the Niedermeyer-Martin Co., which subsequently was incorporated. Until his interest in AT&T was bought out in 1968 Bernard E. Niedermeyer, Jr. as controlling stockholder in AT&T thereafter refused, except for one occasion, to allow AT&T to do any business with Niedermeyer-Martin Co. During this time of inamicable relationships between Bernard E. Niedermeyer, Jr. and the three aforementioned Niedermeyer brothers, AT&T was Niedermeyer-Martin Co.'s chief competitor. Lents acquired petitioners' AT&T common stock because the aforementioned three Niedermeyer brothers, who were shareholders in Lents and with whom Bernard E. Niedermeyer, Jr. had the disagreements, were pursuing a plan to gain control of AT&T.

On their joint federal income tax return for the calendar year 1966, petitioners reported a long-term capital gain of $168,321.58 on the sale to Lents of their AT&T common stock. In his notice of deficiency respondent determined that the $174,975.12 proceeds of the sale were taxable as ordinary income because the transaction qualified as a redemption under section 304(a) and was essentially equivalent to a dividend.

OPINION

The ultimate question to be decided in this case is whether petitioners realized a capital gain or received a dividend on the sale of their AT&T common stock to Lents in 1966. The resolution of this question depends on whether the sale in question was a redemption through the use of a related corporation under the provisions of section 304(a)(1) and, if so, whether the distribution by Lents to petitioners is to be treated as in exchange for the redeemed stock under the provisions of section 302(a) or as of property to which section 301 applies.

Section 304(a)(1) provides, in pertinent part, that, if one or more persons are in "control" of each of two corporations and if one of those corporations acquires stock in the other corporation from the person or persons in control, then the transaction shall be treated as a distribution in redemption for purposes of section 302. Section 304(c)(1) defines the term "control" as "the ownership of stock possessing at least

50 percent of the total combined voting power of all classes of stock entitled to vote, or at least 50 percent of the total value of shares of all classes of stock." Section 304(c)(2) then states that the constructive ownership of stock rules contained in section 318(a) shall apply for the purpose of determining "control," except that the 50-percent limitations of sections 318(a)(2)(C) and 318(a)(3)(C) shall be disregarded for such purpose.

It is clear that by its terms section 304(a)(1) applies to the factual situation of this case. Prior to the transaction here in question, petitioners, husband and wife, together actually owned 1,083.117 shares out of the 4,803.083 outstanding shares of AT&T common stock, its only class of stock entitled to vote. Two of petitioners' sons owned 3,263.072 shares. Thus a total of 4,346.189 shares, or 90.49 percent, of the outstanding voting stock of AT&T was actually or constructively owned by petitioners. Three of petitioners' other sons owned 48 out of 72 shares, or 67 percent, of the outstanding stock of Lents, the ownership of such stock being constructively attributable to petitioners. Consequently, under section 304(c)(1), either petitioner, or both, are regarded as the person or persons in control of both AT&T and Lents prior to the transaction in question. Accordingly, under section 304(a)(1) the transaction in which Lents acquired petitioners' AT&T common stock must be treated as a redemption. The fact that neither petitioner actually owned stock in the acquiring corporation is of no concern here. *Coyle* v. *United States*, 415 F.2d 488, 490 (C.A.

4, 1968); *Fehrs Finance Co.*, 58 T.C. 174, 187 (1972), affd. 487 F.2d 184 (C.A. 8, 1973), cert. den. (April 15, 1974).

Petitioners object to the applicability of section 304 on the ground that the attribution rules of section 318(a) should not be applied in this case. They base this position upon what they term the "bad blood" exception to the attribution rules as applied in *Estate of Arthur H. Squier*, 35 T.C. 950 (1961). In *Squier*, a case under section 302 involving the question of whether a distribution was essentially equivalent to a dividend, this Court decided that, based in part on a "sharp cleavage" between the executor of the taxpayer estate and members of the Squier family, and notwithstanding the attribution rules, the redemption in fact resulted in a crucial reduction of the estate's control over the corporation. The Court held that the distribution there was not essentially equivalent to a dividend and implicit in this conclusion was the belief that the attribution rules were not conclusive in all events in determining whether there had been a significant change of control which would allow the conclusion that the distribution was not essentially equivalent to a dividend. We note that in *Robin Haft Trust*, 61 T.C. 398 (1973), this Court decided that, in light of *United States* v. *Davis*, 397 U.S. 301 (1970), the rationale of *Squier* was no longer applicable to section 302(b)(1).

Besides here, as was not the case with *Squier*, no evidence was adduced to show that there were any disputes or cleavage between petitioners and any of their

sons. The falling out was apparently between petitioners' sons. Apparently, petitioners would have us infer from the disagreements between Bernard E. Niedermeyer, Jr., majority shareholder of AT&T, and three other of their sons, who together were majority shareholders of Lents, that petitioners did not in fact control either corporation. We are unwilling to make this assumption and consequently petitioners' argument fails on its facts.

Moreover, we are of the opinion that the "control" test of sections 304(a)(1) and 304(c) requires that the attribution rules be applied in every case. Congress expressly indicated that the attribution rules of section 318 are to be applied in determining "control" for section 304 purposes. Section 304(c)(2) states that "Section 318(a) (relating to the constructive ownership of stock) *shall* apply for purposes of determining control under paragraph (1)." [Emphasis supplied.] Under section 304(c)(1) "control" is defined only as the ownership (either actually or constructively) of certain amounts of stock. Through the use of precise rules of attribution Congress intended to remove the uncertainties existing under prior law, which had no specific statutory guidance for constructive ownership of stock in the area of corporate distributions and adjustments, in the administration of the provisions where attribution was deemed appropriate. H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591), 83rd Cong., 2d Sess., p. A96 (1954). See also, *Coyle* v. *United States*, *supra* at 490. We think the attribution rules require, through their employ-

ment in section 304, that petitioners be treated as in actual control of both AT&T and Lents, notwithstanding any "bad blood" between petitioners' sons. See *Fehrs Finance Co., supra* at 187-88. Cf. *Robin Haft Trust, supra* at 402-3 (1973).

Petitioners assert that even though the sale is to be treated as a distribution in redemption of Lents stock under section 304(a)(1), they are entitled to treat the distribution as in full payment in exchange for their stock under section 302(a) by meeting one of the tests contained in section 302(b). The determination under section 302(b) is to be made by reference to the issuing corporation's stock, here the AT&T stock, except that the 50 percent limitations of sections 318 (a)(2)(C) and 318(a)(3)(C) are to be disregarded in applying the attribution rules of section 318(a). Section 304(b)(1).

Section 302(b) sets forth certain conditions under which a redemption of stock shall be treated as an exchange. If none of those condiitons are met, section 302(d) provides that the distribution will then be treated as one to which section 301 applies. Petitioners do not contend that section 302(b)(2) or 302(b) (4) are applicable but they argue that the transaction in question meets the test of either section 302(b)(1) or 302(b)(3).[2]

[2] Sec. 302(b). Redemptions treated as Exchanges.—

(1) Redemptions not equivalent to dividends.—Subsection (a) shall apply if the redemption is not essentially equivalent to a dividend.

* * * * * *

(3) Termination of shareholder's interest.—Subsection (a) shall apply if the redemption is in complete redemption of all of the stock of the corporation owned by the shareholder.

The test of section 302(b)(1) requires that the redemption be "not essentially equivalent to a dividend." To meet the test of non-dividend equivalency the redemption must, after application of the attribution rules of section 318(a) to the stock ownership interests as they existed both before and after the redemption, result in "a meaningful reduction of the shareholder's proportionate interest in the corporation." *United States* v. *Davis, supra* at 313. In resolution of the question of dividend equivalency, the fact that the transaction in issue may have had a bona fide business purpose is no longer relevant. *United States* v. *Davis, supra* at 312. Furthermore, the applicability of the attribution rules to section 302(b)(1) is not affected by any "bad blood" between petitioners' sons. *Robin Haft Trust, supra* at 402-3.

As stated above, prior to the redemption petitioners owned, either actually or constructively, 90.49 percent of the outstanding common stock of AT&T. After the redemption, petitioners actually owned no AT&T common stock, although they did own 125 shares out of 2,136 outstanding shares of that corporation's preferred stock. However, petitioners constructively owned 82.96 percent of the outstanding common stock of AT&T comprised as follows: 3,055.221 shares actually owned by their son Bernard E. Niedermeyer, Jr.; 207.851 shares actually owned by their son Walter E. Niedermeyer; and 67 percent of the 1,083.117 shares,

or 725.688 shares, actually owned by Lents and constructively owned by their sons E. C., L. J. and T. J. Niedermeyer. Section 318(a)(5)(A). We do not think a reduction in ownership of the AT&T common stock from 90.49 percent to 82.96 percent constitutes a meaningful reduction of petitioners' proportionate interest in AT&T in the instant case. See *Friend* v. *United States,* 345 F.2d 761, 764 (C.A. 1, 1965); *Stanley F. Grabowski Trust,* 58 T.C. 650, 659 (1972); *Fehrs Finance Co., supra* at 185-6. With such a small change in a high percentage interest, petitioners' control and ownership of AT&T is essentially unaltered and cannot be considered to have undergone a meaningful reduction. An 82.96 percent interest clearly is sufficient to dominate and control the policies of the corporation.

Petitioners next assert, under several theories, that they terminated their interest in AT&T as contemplated in section 302(b)(3). The test provided therein allows the redemption to be treated as an exchange "if the redemption is in complete redemption of all of the stock of the corporation owned by the shareholder." Unless the conditions of section 302(c)(2) are satisfied to exempt petitioners from application of the family attribution rules of section 318(a)(1), these rules apply in their entirety in determining whether there has been a redemption of petitioners' complete stock interest in AT&T.

Petitioners sold all their AT&T common stock to Lents on September 8, 1966 and contributed all their AT&T preferred stock to The Niedermeyer Founda-

tion on December 28, 1966. On September 24, 1968, petitioners filed an amended return for the calendar year 1966 to which was attached the agreement called for in section 302(c)(2)(A)(iii).

It is clear that, if they are to meet the requirements of the test of section 302(b)(3), petitioners must show that they completely terminated their stock interest in AT&T and in so doing they must be able to effect a waiver of the family attribution rules of section 318(a)(1) through use of section 302(c)(2).[3]

While section 1.302-4(b), Income Tax Regs., states that the agreement specified in section 302(c)(2)(A)(iii) must be attached to a return timely filed for the year in which the distribution occurs, several cases have held that some delay in filing the agreement does not vitiate it, and we find those cases to be applicable here where petitioners filed the agreement upon discovering their inadvertent failure to do so earlier.

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[3] Sec. 302(c). Constructive Ownership of Stock.—

* * * * *

(2) For determining termination of interest.—

(A) In the case of a distribution described in subsection (b)(3), section 319(a)(1) shall not apply if—

(i) immediately after the distribution the distributee has no interest in the corporation (including an interest as officer, director, or employee), other than an interest as a creditor.

* * * * *

(iii) the distributee, at such time and in such manner as the Secretary or his delegate by regulations prescribes, files an agreement to notify the Secretary or his delegate of any acquisition described in clause (ii) and to retain such records as may be necessary for the application of this paragraph.

United States v. *G. W. Van Keppel*, 321 F.2d 717 (C.A. 10, 1963); *Georgie S. Cary*, 41 T.C. 214 (1963).

However, the fact that a proper agreement was filed alone does not effect a waiver of the family attribution rules unless the other requirements of section 302(c)(2) are satisfied. The only other requirement in question here is that petitioners must have had no interest in AT&T, other than an interest as a creditor, immediately after the distribution referred to in section 302(b)(3). In the instant case, however, petitioners retained their 125 shares of AT&T preferred stock, at least until December 28, 1966, after the redemption of all their AT&T common stock on September 8, 1966.

Petitioners contend that ownership of these 125 shares of AT&T preferred stock until December 28, 1966, does not prevent application of the exemption provided in section 302(c)(2) and consequently qualification under section 302(b)(3) as having completely terminated their stock interest in AT&T. Petitioners make the following arguments to show that the AT&T preferred stock retained until December 28, 1966 was not the retention of an interest other than that of a creditor and implicitly was not the retention of a stock interest in AT&T: (1) the preferred stock was actually debt; (2) a *de minimis* rule should be applied; (3) the relinquishment of their preferred stock interest in AT&T on December 28, 1966, was "immediately after" the sale of their AT&T common stock on September 8, 1966; and (4) at the time of the sale of their AT&T common stock they intended

to donate their AT&T preferred stock to charity before the year's end.

While citing no cases in their support, petitioners first argue here that the characteristics of the AT&T preferred stock are those commonly associated with debt instruments. We do not agree. A number of factors have been considered in resolution of this question of fact, see *O. H. Kruse Grain & Milling* v. *Commissioner*, 279 F.2d 123, 125-6 (C.A. 9, 1960), affg. a Memorandum Opinion of this Court *Wilbur Security Co.*, 31 T.C. 938, 948 (1959), affd. 279 F.2d 657 (C.A. 9, 1960); however, we see no useful purpose in reciting all the factors but will confine discussion herein only to those we think relevant.

While it is true that the preferred stockholders had no right to participate in the management of the corporation, such fact is not so uncharacteristic of preferred stock rights as to be conclusive, standing alone, of the question at hand. *John Kelley Co.* v. *Commissioner*, 326 U.S. 521, 530 (1946). We think that the following facts are indicative of the equity flavor of the preferred stock: there was no unconditional obligation to pay a principal sum certain on or before a fixed maturity date; the timing of preferred "dividends" was discretionary with the corporate directors; upon liquidation the preferred stockholders would be paid "from the money and/or property available for distribution to shareholders", which indicates to us that the preferred stock was subordinated in priority to the general creditors; AT&T's Articles of Amendment to the Articles of Incorporation used the terms

"dividends", "preferred stock" and "shareholders" with reference to the instruments in question; and the preferred stock was created during a reorganization by a transfer of earned surplus to AT&T's capital account.

We think petitioners' second argument attempting to interject a *de minimis* rule allowing the retention of some small stock interest while qualifying under section 302(b)(3) is wholly without merit. Section 302 (b)(3) clearly requires no less than a complete termination of all petitioners' stock interest in the corporation.

Petitioners next assert that they had no interest in AT&T "immediately after the distribution", as the phrase is used in section 302(c)(2)(A)(i), because the December 28, 1966 contribution should be considered to have occurred immediately after the September 8, 1966 redemption. We assume petitioners believe that if they satisfy this requirement of having no interest "immediately after" the redemption, they will also satisfy the requirement in section 302(b)(3) of having completely terminated their stock interest in AT&T. While we express no opinion on petitioners' apparent belief, we think the words "immediately after" must be given their ordinary meaning and that consequently December 28 cannot be considered "immediately after" September 8. Cf. *Commissioner* v. *Brown*, 380 U.S. 563, 570-1 (1965).

Petitioners' final argument to satisfy the requirements of sections 302(b)(3) and 302(c)(2)(A)(i)

is that, at the time of the transer of their AT&T common stock to Lents, they intended to donate their remaining AT&T preferred stock to charity by the end of 1966. Petitioners did in fact contribute their 125 shares of AT&T preferred stock to The Niedermeyer Foundation on December 28, 1966.

While petitioners' contention in this regard is not entirely clear, their argument appears to be that the September 8, 1966 transfer was but one step in a plan to terminate completely their interest in AT&T, the final step in such plan being their December 28, 1966 contribution of their remaining preferred stock. The only case cited by petitioners, *Arthur D. McDonald*, 52 T.C. 82 (1969), involved the question of whether a plan, calling for the redemption of that taxpayer's E&M preferred stock which was followed by a reorganization in which the taxpayer exchanged his E&M common stock for Borden stock, resulted in a distribution with respect to the preferred stock, which was essentially equivalent to a dividend under section 302 (b)(1). The Court concluded that, after completion of the plan, the taxpayer's direct interest in E&M was terminated and consequently the redemption was not essentially equivalent to a dividend. Petitioners have not urged, and we consider it wise since the attribution rules would frustrate them, that their intention to donate the AT&T preferred stock by year's end shows that the redemption comes within the provisions of section 302(b)(1). Rather, they apparently contend that their intentions to donate the AT&T preferred stock constituted a plan to terminate their in-

terest in AT&T which, with use of section 302(c)(2)(A), satisfies the requirements of section 302(b)(3).

Where redemptions were executed pursuant to a plan to terminate one's interest in a corporation, it has been held that dividend equivalency may be avoided where the individual redemptions are component parts of a single sale or exchange of an entire stock interest. *In Re Lukens' Estate*, 246 F.2d 403 (C.A. 3, 1957), reversing 26 T.C. 900 (1956); *Jackson Howell*, 26 T.C. 846 (1956), affd. 247 F.2d 156 (C.A. 9, 1957); *Carter Tiffany*, 16 T.C. 1443 (1951).[4] Where there is a plan which is comprised of several steps, one involving the redemption of stock that results in a complete termination of the taxpayer's interest in a corporation, section 302(b)(3) may apply. *Otis P. Leleux*, 54 T.C. 408 (1970); *Estate of Oscar L. Mathis*, 47 T.C. 248 (1966). However, the redemption must occur as part of a plan which is firm and fixed and in which the steps are clearly integrated. *Otis P. Leleux*, *supra* at 418.

We regard the evidence presented on petitioners' behalf as too insubstantial to prove the existence of such a plan. Petitioner Bernard E. Niedermeyer's self-

[4] The cited cases were decided under the "essentially equivalent to the distribution of a taxable dividend" standard of sec. 115(g)(1), I.R.C. 1939. Sec. 29.115-9 Regs. 111 provided that "a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend." Under present law, sec. 302(b)(1) would now appear applicable if completion of the plan results in a meaningful reduction in the taxpayer's proportionate interest in the corporation.

serving statement during the trial that at the time of transfer of the AT&T common stock on September 28, 1966, he intended to donate the AT&T preferred stock to charity by year's end and petitioners' prior history of contributions do not establish to us a firm and fixed plan in which all the steps are clearly integrated.

The plan certainly was not in writing and there was no evidence of communication of petitioners' asserted donative intention to the charity or to anyone. One of petitioners' sons testified that Lents acquired petitioners' AT&T common stock in an attempt to gain control of AT&T. However, no mention at all was made by this son of any desire on petitioners' part to terminate their total interest in AT&T. Petitioners could easily have changed their minds with regard to any intent to donate the preferred stock. Clearly petitioners' decision to donate the preferred stock has not been shown to be in any way fixed or binding. Cf. *Estate of Oscar L. Mathis*, *supra* at 257; *Henry McK. Haserot*, 46 T.C. 864, 868 (1966), affd. sub. nom. *Commissioner* v. *Stickney*, 399 F.2d 828 (C.A. 6, 1968), on remand from 355 F.2d 200 (C.A. 6, 1965). We note that *Arthur D. McDonald*, *supra* cited by petitioners, involved a written plan which was fixed as to its terms and apparently binding. By the above discussion we do not mean to indicate that all such plans need to be in writing, absolutely binding or communicated to others, but we do think that the above mentioned factors, all of which are lacking here, tend to show a plan which is fixed and firm.

Since petitioners have not established that the re-

demption is to be treated as an exchange under section 302(a), the proceeds are to be treated as a distribution of property to which section 301 applies and as a dividend as determined by the respondent.[5]

Decision will be entered for the Respondent.

EXTRACTS FROM STIPULATION OF FACTS
UNITED STATES TAX COURT

BERNARD E. NIEDERMEYER and
TESSIE S. NIEDERMEYER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET No. 1673-71

SUPPLEMENTAL STIPULATION OF FACTS

* * * * *

12. The Niedermeyer family through the ownership or control of a number of corporations and partnerships is engaged in the business of manufacturing and selling special wood products and related construction materials including special fabricated and

[5] We note that competent evidence has not been presented from which we can determine whether the distribution in question was or was not made out of Lents' earnings and profits. However, petitioners have not argued that such distribution was not made out of Lents' earnings and profits. Consequently, we assume and have found as a fact that earnings and profits were sufficient to cover the distribution during the year in issue. *Harry Makransky*, 36 T.C. 446, 453 (1961), affd. 321 F.2d 598 (C.A. 3, 1963).

treated wood products. For more than a year prior to October 1, 1963, Niedermeyer-Martin Co. was a partnership whose general partners were Bernard, Sr. (29% partnership interest), Bernard Jr., (27% partnership interest), Edward C. (16% partnership interest), Linus J. (16% partnership interest) and Thomas J. Niedermeyer (12% partnership interest). During the year 1963 and prior to October 1, a dispute arose between the junior partners, Edward C., Linus J. and Thomas J. on one hand, and Bernard Jr., senior partner, on the other. Edward C., Linus J. and Thomas J. engaged separate counsel and were threatening to bring an accounting action against Bernard Jr. who owned a substantial portion of the stock of American Timber & Trading Co., McCoy Pole and Lumber Co., Columbia Woodworking Company and American Wood Preserving Co., all of which were Oregon corporations which owned wood fabrication and treating facilities which were necessary for the principal activity of the Niedermeyer-Martin Co. partnership which was engaged in the business of selling special wood products and related construction supplies and materials. Edward C., Linus J. and Thomas J. did not own any shares in such latter companies.

13. Shortly prior to October 1, 1963, an agreement was reached between the foregoing Niedermeyer brothers and Bernard Sr. Bernard Jr. retired from the Niedermeyer-Martin Co. partnership, his partnership interest was purchased by his three partner-brothers, and on October 1, 1963, Niedermeyer-

Martin Co. was formed as an Oregon corporation by the four remaining partners of Niedermeyer-Martin Co., i.e., Edward C., Linus J., Thomas J. and Bernard Sr. Upon the formation of Niedermeyer-Martin Co. on October 1, 1963, it did not own any fabrication and treating facilities, and the fabrication and treating facilities which became part of the properties of AT&T through the merger hereinafter referred to were not available to Niedermeyer-Martin Co.

* * * * *

16. Lents Industries, Inc. (Lents) was incorporated on or about May 29, 1963 at the direction of Edward C., Linus J. and Thomas J. Niedermeyer. On or about June 7, 1963, Lents was fully organized and said three Niedermeyer brothers became the owners of all of its shares. On or about September 17, 1965, William G. Cooney, Stephen V. Nava and Mark T. Moothart became owners of the shares of Lents as set forth in paragraph 6 of the Stipulation to which this stipulation is supplemental. Such six persons since such date have been all the directors of Lents.

17. Lents was originally formed by Edward C., Linus J. and Thomas J. Niedermeyer during the time that they were having a controversy with their brother Bernard Jr. Subsequently, Lents was operated to handle sales of lumber and other materials including sales to Arab countries not available to Niedermeyer-Martin Co. Lents does not have a separate place of business from Niedermeyer-Martin Co., and its employees consist of William G. Cooney, Stephen

V. Nava and Mart T. Moothart. The three employees are stockholders, officers and employees of Niedermeyer-Martin Co., and were each paid a salary from Lents of $150 per month at all times material hereto. At no time were Bernard Sr. nor Tessie either officers, directors, employees or stockholders of Lents.

* * * * *

20. AT&T was the surviving corporation by a merger, the parties to which were American Wood Preserving Co., Columbia Woodworking Company, McCoy Pole and Lumber Co. and AT&T, all of which were Oregon corporations at the time they were merged by Articles of Merger into AT&T on October 10, 1963. . . .

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 301. DISTRIBUTIONS OF PROPERTY.

(a) *In General.*—Except as otherwise provided in this chapter, a distribution of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c).

* * * * *

(c) *Amount Taxable.*—In the case of a distribution to which subsection (a) applies—

(1) *Amount Constituting Dividend.* — That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

* * * * *

SEC. 302. DISTRIBUTIONS IN REDEMPTION OF STOCK.

(a) *General Rule.*—If a corporation redeems its stock (within the meaning of section 317(b)), and if paragraph (1), (2), (3), or (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock.

(b) *Redemptions Treated as Exchanges.*—

(1) *Redemptions not equivalent to dividends.*—Subsection (a) shall apply if the redemption is not essentially equivalent to a dividend.

* * * * *

(3) *Termination of shareholder's interest.*—Subsection (a) shall apply if the redemption is in complete redemption of all of the stock of the corporation owned by the shareholder.

(c) *Constructive Ownership of Stock.*—

* * * * *

(2) *For determining termination of interest.*—

(A) In the case of a distribution described in subsection (b)(3), section 318(a)(1) shall not apply if—

(i) immediately after the distribution the distributee has no interest in the corporation (including an interest as officer, director, or employee), other than an interest as a creditor.

(ii) the distributee does not acquire any such interest (other than stock acquired by bequest or inheritance) within 10 years from the date of such distribution, and

(iii) the distributee, at such time and in such manner as the Secretary or his delegate by regulations prescribes, files an agreement to notify the Secretary or his delegate of any acquisition described in clause (ii) and to retain such records as may be necessary for the application of this paragraph.

SEC. 304. REDEMPTION THROUGH USE OF RELATED CORPORATIONS.

(a) *Treatment of Certain Stock Purchases.*—

(1) *Acquisition by related corporation (other than subsidiary).*—For purposes of sections 302 and 303, if—

(A) one or more persons are in control of each of two corporations, and

(B) in return for property, one of the corporations acquires stock in the other corporation from the person (or persons) so in control,

then (unless paragraph (2) applies) such property shall be treated as a distribution in redemption of the stock of the corporation acquiring such stock. In any such case, the stock so acquired shall be treated as having been transferred by the person from whom acquired, and as having been received by the corporation acquiring it, as a contribution to the capital of such corporation.

* * * * *

(b) *Special Rules for Application of Subsection (a).*—

(1) *Rule for determinations under sections 302(b).*—In the case of any acquisition of stock to which subsection (a) of this section applies, determinations as to whether the acquisition is, by reason of section 302(b), to be treated as a distribution in part or full payment in exchange for the stock shall be made by

reference to the stock of the issuing corporation. In applying section 318(a) (relating to constructive ownership of stock) with respect to section 302(b) for purposes of this paragraph, sections 318(a)(2)(c) and 318(a)(3)(C) shall be applied without regard to the 50 percent limitation contained therein.

* * * * *

(c) [as amended by Sec. 4(b)(1), Act of August 31, 1964, P.L. 88-554, 78 Stat. 761] *Control.*—

(1) *In General.* — For purposes of this section, control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote, or least 50 percent of the total value of shares of all classes of stock. If a person (or persons) is in control (within the meaning of the preceding sentence) of a corporation which in turn owns at least 50 percent of the total combined voting power of all stock entitled to vote of another corporation, or owns at least 50 percent of the total value of the shares of all classes of stock of another corporation, then such person (or persons) shall be treated as in control of such other corporation.

(2) *Constructive ownership.* — Section 318(a) (relating to the constructive ownership of stock) shall apply for purposes of determining control under paragraph (1). For purposes of the preced-

ing sentence, section 318(a)(2)(C) and 318(a)(3)(C) shall be applied without regard to the 50 percent limitation contained therein.

SEC. 318. CONSTRUCTIVE OWNERSHIP OF STOCK.

(a) *General Rule.* — For purposes of those provisions of this subchapter to which the rules contained in this section are expressly made applicable—

(1) *Members of family.*—

(A) *In general.*—An individual shall be considered as owning the stock owned, directly or indirectly, by or for—

* * * * *

(ii) his children, grandchildren, and parents.

(2) [as amended by Sec. 4(a), Act of August 31, 1964, *supra*] Attribution from partnerships, estates, trusts, and corporations.—

* * * * *

(C) *From corporations.*—If 50 percent or more in value of the stock in a corporation is owned, directly or indirectly, by or for any person, such person shall be considered as owning the stock owned, directly or indirectly, by or for such corporation, in that proportion which the value of the stock which such person so owns bears to the value of all the stock in such corporation.

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No. 76-388

In the Supreme Court of the United States

October Term, 1976

Bernard E. Niedermeyer and Tessie S. Niedermeyer, petitioners

v.

Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. App. A-5 to A-26) are reported at 62 T.C. 280. The opinion of the court of appeals (Pet. App. A-1 to A-2) is reported at 535 F. 2d 500.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1976 (Pet. 2), and a petition for rehearing *en banc* was denied on June 23, 1976 (Pet. App. A-3 to A-4). The petition for a writ of certiorari was filed on September 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the proceeds of the sale by petitioners of the common stock of a corporation controlled by them and two of their sons to a second corporation controlled by their three other sons were taxable as a dividend under Section 304 of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 301, 302, 304 and 318 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra,* pp. 1a-5a.

STATEMENT

Petitioners, who are husband and wife, owned 22.58 percent of the common stock and 125 shares of the $100 par value, 6 percent cumulative preferred stock of American Timber & Trading Co., Inc. ("Timber"). Two of their sons, Bernard E. Niedermeyer, Jr., and Walter E. Niedermeyer, owned 67.91 percent of Timber's common stock. Three other sons, E. C. Niedermeyer, L. J. Niedermeyer, and T. J. Niedermeyer, owned 67 percent of the common stock of Lents Industries, Inc. (Pet. App. A-6 to A-9).

On September 8, 1966, petitioners sold all of their Timber common stock to Lents for $174,975.12, at a time when Lents' earnings and profits exceeded that amount. Petitioners retained their Timber preferred stock until December 28, 1966, when they contributed it to the Niedermeyer Foundation, and claimed a $12,500 charitable deduction on their 1966 federal income tax return. On September 24, 1968, petitioners filed an amended federal income tax return for 1966, to which they attached an agreement, pursuant to Section 302(c)(2)(A)(iii) of the Internal Revenue Code of 1954, to notify the Commissioner of any acquisition by them of Timber

stock (other than by inheritance) or of their acceptance of an officership, directorship, or other employment in Timber (Pet. App. A-9 to A-10).

Petitioners reported the gain from the sale of their Timber stock as long-term capital gain. On audit, the Commissioner determined that the proceeds of sale of the Timber stock were taxable as a dividend at ordinary income rates on the ground that after application of the family stock ownership attribution rules of Section 318 of the Code, petitioners were in "control" of Timber and Lents within the meaning of Section 304(c). The Commissioner thereby concluded that the transaction was a "brother-sister" corporate stock redemption under Section 304(a)(1) to which none of the exceptions of Section 302(b) were applicable (Pet. App. A-12 to A-13).

The Tax Court upheld the Commissioner's determination (Pet. App. A-12 to A-26) and the court of appeals affirmed *per curiam* (Pet. App. A-1 to A-2).

ARGUMENT

1. The decision below correctly held that the proceeds of petitioners' sale of their Timber common stock to Lents Industries, Inc. was taxable to them as a dividend. Section 304(a)(1) of the Code, Appendix, *infra,* p. 3a, generally provides that if one or more persons are in "control" (50 percent or more stock ownership) of each of two corporations (here Timber and Lents) and if one of those corporations acquires stock in the other corporation from the person or persons in control, then the transaction shall be treated as a distribution in redemption of the stock of the acquiring corporation (Lents) under Section 302. Pursuant to Section 304(b)(1), the determination under Section 302 shall be made with respect to the stock of the issuing corporation (Timber).

The legislative intent underlying Section 304(a)(1) was to discourage the use of related, commonly controlled

corporations to bail out corporate earnings at capital gains rates, and to "characterize as redemptions distributions which are cast in the form of sales." S. Rep. No. 1622, 83d Cong., 2d Sess. 239 (1954). See generally Kahn, *Basic Corporate Taxation* 50-53 (1973 ed.). Thus, "in any case in which 1 or more persons who are in control of each of 2 corporations (brother-sister corporations) sell the stock of one of the corporations to another of such corporations the proceeds of such sale shall be considered to be an amount distributed in redemption of the stock of the corporation which purchased the stock" (S. Rep. No. 1622, *supra,* at 239), and the determination whether such sale "is, by virtue of section 302(b), to be treated as a distribution in part or full payment in exchange for such stock * * * shall be made by reference to the stock of the corporation issuing the stock purchased." (S. Rep. No. 1622, *supra,* at 240.) By applying the attribution rules of Section 318 in determining whether common control of such corporations exists, Congress intended that "an individual shall be considered as owning stock owned directly or indirectly by or for his children." H. R. Rep. No. 1337, 83d Cong., 2d Sess. A96 (1954).

Prior to the transaction at issue, petitioners owned 22.58 percent of the common stock of Timber. Two of their sons owned 67.91 percent of the Timber common stock. Thus, for purposes of the family stock attribution rules of Section 318(a)(1),[1] petitioners owned 90.49 percent of the Timber common stock. Three of petitioners' other sons owned 67 percent of the stock of Lents, the ownership of which was also attributed to petitioners.

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[1]The family and corporate stock attribution rules of Section 318(a)(1(A)(ii) and 318(a)(2)(C) are made specifically applicable to this transaction by Section 304(c)(2).

Pursuant to Section 304(c)(1), petitioners were therefore in "control" of both Timber and Lents prior to their sale of their Timber stock to Lents. Moreover, under Section 304(a)(1), their sale is regarded as a redemption of the stock of Lents to be measured under Section 302 by their ownership of Timber stock before and after the transaction.

It is undisputed that under the attribution rules, petitioners are deemed to have held 90.49 percent of the Timber common stock before the sale and 82.96 percent after the sale to Lents. Accordingly, petitioners no longer argue that the sale was a "substantially disproportionate redemption of stock" under Section 302(b)(2). Nor did petitioners' sale qualify as a complete "termination of shareholder's interest" under Section 302(b)(3). That provision only applies if "the redemption is in complete redemption of all of the stock of the corporation owned by the shareholder." Since petitioners retained 125 shares of Timber preferred stock until December 28, 1966, the sale was not a complete termination of interest under Section 302(b)(3).[2]

2. Petitioners contend (Pet. 8-10) that the transaction qualifies for capital gains treatment as a "redemption * * * not essentially equivalent to a dividend" under Section 302(b)(1). They complain (Pet. 9) that the application of the attribution rules is unfair because they did not in fact control either Lents or Timber but were only deemed to control these corporations through their sons' stock ownership. But in *United States* v. *Davis,*

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[2]Although petitioners contend (Pet. 10) that application of the attribution rules in this case imposes hardship on family-owned businesses, they acknowledge (Pet. 14) that they would have achieved capital gains treatment under Section 302(b)(3) had they not retained the 125 shares of Timber preferred stock.

397 U.S. 301, this Court held that the stock attribution rules of Section 318(a) apply to all of Section 302, observing that such a result was "in accord with the decisions of the other courts of appeals, a longstanding treasury regulation, and the opinion of the leading commentators" (397 U.S. at 306; footnotes omitted).

In *Davis*, the Court held that regardless of business purpose, a redemption is always "essentially equivalent to a dividend" within the meaning of Section 302(b)(1) if it does not change the shareholders' proportionate interest in the corporation. Since the transaction at issue resulted in a reduction in petitioners' interest in Timber common stock only from 90.49 percent to 82.96 percent, the Tax Court correctly concluded that their "control and ownership of [Timber] is essentially unaltered and cannot be considered to have undergone a meaningful reduction" (Pet. App. A-18).

Petitioners nevertheless contend (Pet. 8-10) that this Court should reconsider the rule announced in *United States* v. *Davis*, *supra*. They subscribe to the arguments advanced in the dissenting opinion filed on behalf of three members of the Court (Powell, Douglas, and Blackmun, JJ.) from the denial of certiorari in *Miele* v. *Commissioner*, 474 F. 2d 1338 (C.A. 3), certiorari denied *sub nom.* *Albers* v. *Commissioner*, 414 U.S. 982. But quite apart from the merits of the *Davis* rule, the considerations expressed by the dissenting opinions there (397 U.S. at 313-314) and in *Albers* do not support petitioners' claims.

In those cases, the taxpayers urged that the issuance of the redeemed stock and the stock redemptions were prompted by independent non-tax business reasons that arguably justified capital treatment. In both of those cases, the taxpayers subscribed to a particular stock issue to fund a specific corporate activity and redeemed their stock when the business need came to an end. Here, however, there is nothing in the record to suggest that petitioners' purchase of Timber common stock and subsequent sale of it to Lents were supported by non-tax business motives.[3] Thus, while we submit that *Davis* was correctly decided, this case does not present the question resolved in that case as to whether Section 302(b)(1) requires "a factual determination as to the business purpose of the stock redemption" (*Albers* v. *Commissioner*, *supra*, 414 U.S. at 986 (dissenting opinion)).[4]

3. Finally, petitioners contend (Pet. 15-17) that the decision below conflicts with *Robin Haft Trust* v. *Commissioner*, 510 F. 2d 43 (C.A. 1). There, the court remanded the case for further findings on whether there was sufficient enmity between the taxpayers and the persons whose stock was being attributed to them so as to foreclose the application of the stock attribution rules. But there is nothing in the record here to support the existence of any hostility between petitioners and their son Bernard, whose stock was attributed to them (Pet. App. A-2, A-14 to A-15). There is accordingly no basis in this case for any "family hostility" exception to the application of the stock attribution rules. Cf. *Squier* v. *Commissioner*, 35 T.C. 950.

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[3]Petitioners assert (Pet. 9) that "[t]here was a good business reason for Lents acquiring the [Timber] stock." However, they do not further elaborate upon this point.

[4]Petitioners also contend (Pet. 10-15) that the decision below erroneously extends the *Davis* rule because they did not actually own the stock and because there was no tax avoidance motive for the transaction. But the taxpayer in *Davis* made the same claims (see 397 U.S. at 305, 311-312).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1976.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 301. DISTRIBUTIONS OF PROPERTY.

(a) *In General.*—Except as otherwise provided in this chapter, a distribution of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c).

* * * * *

(c) *Amount Taxable.*—In the case of a distribution to which subsection (a) applies—

(1) *Amount constituting dividend.*—That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

* * * * *

SEC. 302. DISTRIBUTIONS IN REDEMPTION OF STOCK.

(a) *General Rule.*—If a corporation redeems its stock (within the meaning of section 317(b)), and if paragraph (1), (2), (3), or (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock.

(b) *Redemptions Treated as Exchanges.*—

(1) *Redemptions not equivalent to dividends.*—Subsection (a) shall apply if the redemption is not essentially equivalent to a dividend.

* * * * *

(3) *Termination of shareholder's interest.*—Subsection (a) shall apply if the redemption is in complete redemption of all of the stock of the corporation owned by the shareholder.

* * * * *

(c) *Constructive Ownership of Stock.*—

(1) *In general.*—Except as provided in paragraph (2) of this subsection, section 318(a) shall apply in determining the ownership of stock for purposes of this section.

(2) *For determining termination of interest.*—

(A) in the case of a distribution described in subsection (b)(3), section 318 (a)(1) shall not apply if—

(i) immediately after the distribution the distributee has no interest in the corporation (including an interest as officer, director, or employee), other than an interest as a creditor,

(ii) the distributee does not acquire any such interest (other than stock acquired by bequest or inheritance) within 10 years from the date of such distribution, and

(iii) the distributee, at such time and in such manner as the Secretary or his delegate by regulations prescribes, files an agreement to notify the Secretary or his delegate of any acquisition described in clause (ii) and to retain such records as may be necessary for the application of this paragraph.

* * * * *

(d) *Redemption Treated as Distributions of Property.*—Except as otherwise provided in this subchapter, if a corporation redeems its stock (within the meaning of section 317(b)), and if subsection (a) of this section does not apply, such redemption shall be treated as a distribution of property to which section 301 applies.

* * * * *

SEC. 304. REDEMPTION THROUGH USE OF RELATED CORPORATIONS.

(a) *Treatment of Certain Stock Purchases.*—

(1) *Acquisition by related corporation (other than subsidiary).*—For purposes of sections 302 and 303, if—

(A) one or more persons are in control of each of two corporations, and

(B) in return for property, one of the corporations acquires stock in the other corporation from the person (or persons) so in control,

then (unless paragraph (2) applies) such property shall be treated as a distribution in redemption of the stock of the corporation acquiring such stock. In any such case, the stock so acquired shall be treated as having been transferred by the person from whom acquired, and as having been received by the corporation acquiring it, as a contribution to the capital of such corporation.

* * * * *

(b) [as amended by Sec. 4(b)(1), Act of August 31, 1964, Pub. L. 88-554, 78 Stat. 761] *Special Rules for Application of Subsection (a).*—

(1) *Rule for determinations under section 302(b).*—In the case of any acquisition of stock to which subsection (a) of this section applies, determinations as to whether the acquisition is, by reason of section 302(b), to be treated as a distribution in part or full payment in exchange for the stock shall be made by reference to the stock of the issuing corporation. In applying section 318(a)

(relating to constructive ownership of stock) with respect to section 302(b) for purposes of this paragraph, sections 318(a)(2)(C) and 318 (a)(3)(C) shall be applied without regard to the 50 percent limitation contained therein.

* * * * *

(c) [as amended by Sec. 4(b)(1), Act of August 31, 1964, *supra*] *Control.*—

(1) *In General.*—For purposes of this section, control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote, or at least 50 percent of the total value of shares of all classes of stock. If a person (or persons) is in control (within the meaning of the preceding sentence) of a corporation which in turn owns at least 50 percent of the total combined voting power of all stock entitled to vote of another corporation, or owns at least 50 percent of the total value of the shares of all classes of stock of another corporation, then such person (or persons) shall be treated as in control of such other corporation.

(2) *Constructive ownership.*—Section 318(a) (relating to the constructive ownership of stock) shall apply for purposes of determining control under paragraph (1). For purposes of the preceding sentence, sections 318(a)(2)(C) and 318(a) (3)(C) shall be applied without regard to the 50 percent limitation contained therein.

SEC. 318. CONSTRUCTIVE OWNERSHIP OF STOCK.

(a) *General Rule.*—For purposes of those provisions of this subchapter to which the rules contained in this section are expressly made applicable—

(1) *Members of family.*—

(A) *In general.*—An individual shall be considered as owning the stock owned, directly or indirectly, by or for—

* * * * *

(ii) his children, grandchildren, and parents.

* * * * *

(2) [as amended by Sec. 4(a), Act of August 31, 1964, *supra*] *Attribution from partnerships, estates, trusts, and corporations.*—

* * * * *

(C) *From corporations.*—If 50 percent or more in value of the stock in a corporation is owned, directly or indirectly, by or for any person, such person shall be considered as owning the stock owned, directly or indirectly, by or for such corporation, in that proportion which the value of the stock which such person so owns bears to the value of all the stock in such corporation.